

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BAP GROUP, INC.	:	DETERMINATION DTA NO. 819962
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period Ended	:	
February 13, 2002.	:	

Petitioner, BAP Group, Inc., 295 Main Street, Suite 210, Buffalo, New York 14203, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended February 13, 2002.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 77 Broadway, Buffalo, New York, on July 27, 2004 at 10:45 A.M. Petitioner appeared by Kathleen Linhardt, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Carmen Martorana, Jr., CPA).

Since neither party herein elected to reserve time for the submission of a post-hearing brief, the three-month period for the issuance of this determination commenced as of the date the small claims hearing was held.

ISSUES

I. Whether petitioner filed a timely protest within 90 days of the date the Division issued a Notice of Determination.

II. Whether the Division of Taxation properly determined that petitioner was liable for a penalty of \$2,500.00 imposed pursuant to Tax Law § 480-a(3)(a) for failure to possess a valid New York State Certificate of Registration for the retail sales of cigarette or tobacco products.

FINDINGS OF FACT

1. Petitioner herein, BAP Group, Inc., operates three retail convenience stores selling gasoline, grocery items and cigarettes. One store, doing business as Southtown Trading Company, is located in West Seneca, New York, and the other two stores, known as Allentown Trading Company and Downtown Trading Company, are both located in Buffalo, New York. Petitioner's corporate office is located at 295 Main Street, Suite 210, Buffalo, New York.

2. On February 13, 2002, an investigator from the Division of Taxation's ("Division") Office of Tax Enforcement conducted a regulatory inspection of Southtown Trading Company at its retail location at 315 Orchard Park Road, West Seneca, New York. The inspection revealed that petitioner's entire inventory of cigarettes offered for sale at this location, consisting of 685 cartons, contained the proper cigarette tax stamps. However, the investigator could not find any record of petitioner's having a valid Certificate of Registration as a retail dealer of cigarettes for the 2002 calendar year. On February 15, 2002, shortly after the regulatory inspection, petitioner submitted to the Division an application to be registered as a retail dealer of cigarettes and tobacco products for 2002, together with a check for \$300.00, which amount represents the cost of the registration for all three stores.

3. On July 18, 2002, the Division issued Notice of Determination L-021318575 to "BAP Group, Inc., 315 Orchard Park Rd, West Seneca, NY 14224-2634" asserting that a penalty in the amount of \$3,500.00 was due for the period ended February 13, 2002. The notice advised petitioner as follows:

During an inspection of your premises, on 02/13/02, you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarettes and/or tobacco products.

Therefore, a civil fine is imposed under Article 20 of the New York State Tax Law.

At the small claims hearing held herein, the Division stipulated to the reduction of the penalty asserted in the Notice of Determination from \$3,500.00 to \$2,500.00, which reduction was apparently based on prior communications the Division had with petitioner's representative.

4. On February 26, 2003, petitioner protested the Notice of Determination dated July 18, 2002 by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On May 2, 2003, BCMS issued a Conciliation Order Dismissing Request wherein petitioner's request for a conference was denied since the February 26, 2003 request for conference had not been filed, as required by law, within 90 days of the date the Notice of Determination was mailed. Petitioner thereafter filed a timely petition with the Division of Tax Appeals contesting the Conciliation Order Dismissing Request. At the request of both parties, the small claims hearing held herein addressed both the jurisdictional issue concerning the timeliness of petitioner's protest and the substantive issue regarding the assessment of the penalty for failure to have a Certificate of Authority at the time of the regulatory inspection.

5. In instances such as this where the timeliness of the Request for Conciliation Conference is in dispute, the Division has the burden of proving proper mailing of the notice. To establish the date that the notice was mailed, the Division offered in evidence only a partial photocopy of one page of its certified mail record which lists petitioner's name, certified mail number 7104 1002 9730 1611 1376 and assessment number L-021318575. More than one-half of the postmark shown on the photocopy of the certified mail record submitted in evidence was cutoff and the portion which was left was so faint it could not be read. No testimony or affidavits from employees familiar with the creation, processing and mailing of notices of determination were introduced into the record.

6. The Division initially asserted the maximum penalty of \$3,500.00 in its July 18, 2002 Notice of Determination because a previous inspection of one of petitioner's stores revealed that it had failed to obtain the required Certificate of Registration as a retail dealer of cigarettes. Specifically, petitioner's store doing business as Allentown Trading Co. was inspected on March 21, 2000, and while all 473 cartons of cigarettes were found to contain the proper cigarette tax stamps, petitioner did not have a valid Certificate of Registration on file. As the result of this

inspection, the Division issued an assessment to petitioner asserting that a penalty of \$1,000.00 was due for its failure to have a valid Certificate of Registration. The penalty was later reduced to \$500.00, which amount petitioner paid.

7. Petitioner is primarily involved in real estate development and its operation of the three convenience stores is essentially an offshoot endeavor which started approximately 20 years ago. Since 1991 a retail dealer of cigarettes is required to obtain from the Division on or before January 1 of each year a Certificate of Registration as a retail dealer of cigarettes. Petitioner has obtained the required Certificate of Registration for every year since 1991 except for 2000 and 2002. Petitioner has also met its other tax obligations, e.g., sales tax, withholding taxes, corporation franchise tax, in a timely manner, and the two Certificate of Registration violations represent the only instances where petitioner has had a dispute with the Division.

8. The Division, approximately 60 to 90 days before the end of each calendar year, will send to all currently registered vendors an application to renew their Certificate of Registration. In the instant matter, it appears that the Division sent the renewal application to petitioner at the Southtown Trading Company retail location at 315 Orchard Park Road, West Seneca, New York, instead of the corporate headquarters address at 295 Main Street, Suite 210, Buffalo, New York. All corporate officers of petitioner and also its general manager are located at the 295 Main Street, Suite 210, Buffalo, New York address and all financial and tax matters are handled through this office. It has always been petitioner's practice to have all tax related documents for the three convenience stores mailed to this address since only a store manager and entry level cashiers work at the retail store locations. Petitioner was "notice dependent" for purposes of the renewal of its Certificate of Registration and its failure to apply for the Certificate of Registration for 2002 was the result of its failure to receive the renewal notice at the corporation's main office. Since this last violation, petitioner has put in place internal follow-up procedures so that it would no longer be "notice dependent" and thus ensure the timely renewal of its Certificate of Registration.

SUMMARY OF PETITIONER'S POSITION

9. Petitioner argues that its failure to timely register for 2002 was unintentional. Petitioner notes that it immediately filed for the Certificate of Registration as soon as it became aware that it had neglected to do so and that it has always met its other tax obligations in a timely fashion. Petitioner asserts that the penalty at issue herein is arbitrary given that there were no untaxed cigarettes found during either of the two regulatory inspections conducted by the Division; that its failure to file timely for the 2002 Certificate of Registration was essentially a harmless mistake which merely deprived the State of the \$300.00 fee for some 46 days; that the penalty at issue, \$2,500.00, is grossly disproportionate to the nature of the offense; that, with the exception of the two violations noted, petitioner has been a good corporate taxpayer with a history of meeting its tax obligations in a timely manner; and, that it has taken measures to ensure that this violation will not occur again.

CONCLUSIONS OF LAW

A. Tax Law §§ 478 and 480-a(3)(a) authorize the Division to issue a Notice of Determination to a taxpayer assessing civil fines for the failure to obtain and display a valid certificate of registration for the retail sale of cigarettes and tobacco products. The determination finally and irrevocably fixes the tax unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking a revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with BCMS. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Tax Law § 480-a(2)(d) provides that the provisions of Article 28 of the Tax Law relating to the personal liability for the tax, administration, collection and determination of tax shall apply to Article 20 of the Tax Law in the same manner and with the same force and effect

as if those provisions of Article 28 had been fully incorporated into Article 20 (*Matter of Alawi*, Tax Appeals Tribunal, April 15, 2004). Tax Law § 1147(a)(1), contained within Article 28, provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*)

C. Where the timeliness of a request for conciliation conference or a petition is at issue, the Division must prove proper mailing of the subject notice (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may prove such mailing by offering evidence as to its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing of the particular document in question (*id.*). In the instant matter, the Division’s evidence to prove that the Notice of Determination was properly mailed to petitioner at its last known address on July 18, 2002 is clearly inadequate. The photocopy of the certified mail record in evidence contains no discernable postmark and the Division failed to adduce any evidence from employees familiar with the creation, processing and mailing of notices of determination to establish that it had a standard practice with respect to the mailing of notices of determination and that the practice was followed in this matter. Accordingly, since the Division has failed to establish the date that it mailed the Notice of Determination, petitioner’s request for a conciliation conference must be deemed timely.

D. In the instant matter, there is no dispute that petitioner is a retail dealer of cigarettes and tobacco products as defined in Article 20 of the Tax Law and, as such, is required to obtain and publicly display a Certificate of Registration pursuant to Tax Law § 480-a(1)(a). Tax Law § 480-a(1)(c) provides that the Certificate of Registration is “valid for a calendar year” and “must be renewed each year.”

E. Tax Law § 480-a(3)(a) imposes a civil fine upon a retail dealer who fails to obtain a Certificate of Registration. Prior to November 14, 2000 the fine for the first violation was “not to exceed one thousand dollars. . . .” Effective November 14, 2000 the statute was amended and provided that for a second or subsequent violation within three years following a prior finding of violation the retail dealer was “liable for a civil fine not less than one thousand dollars but not to exceed three thousand five hundred dollars.” Since the violation at issue herein occurred on February 13, 2002, a date within three years of the March 21, 2000 violation, the Division initially asserted the maximum penalty of \$3,500.00 for said second violation. As noted in Finding of Fact “3” the Division has agreed to reduce the penalty to \$2,500.00.

F. After a careful examination of the entire record herein, I believe that it is fair and equitable (Tax Law § 2012) to reduce the penalty asserted herein from \$3,500.00 to the \$1,000.00 minimum provided for by statute. Petitioner has, with the exception of the two Certificate of Registration violations, met all its tax obligations in a timely manner; has put in place safeguards to ensure that no future violations occur; and, perhaps most importantly, no unstamped or illegally stamped cigarettes were found during either inspection. Furthermore, petitioner immediately obtained the Certificate of Registration once it became aware of the fact that it had not renewed the certificate for 2002. Given that the Division was without the \$300.00 fee for the Certificate of Registration for only 46 days, that the offense was ministerial in nature and considering the other factors enumerated above, it is, in my view, fair and equitable to reduce the penalty to the \$1,000.00 minimum.

G. The petition of BAP Group, Inc. is granted to the extent provided for in Conclusion of Law “F”; the Division is directed to modify the Notice of Determination dated July 18, 2002 so as to be consistent with the determination issued herein; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
October 21, 2004

/s/ James Hoefer
PRESIDING OFFICER